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FEDERAL ELECTION COMMISSION

[Notice 1989-13]

11 CFR Parts 100, 102, 110, 114 and 9034

Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions

AGENCY: Federal Election Commission.

ACTION: Final Rule; Transmittal of regulations to Congress.

SUMMARY: The Commission has revised its regulations at 11 CFR 110.3, 110.4, 110.5 and 110.6, concerning affiliated committees, transfers, contributions in the name of another, annual contribution limits and earmarked contributions. These regulations implement the contribution limitations and prohibitions established by 2 U.S.C. 441a, 441e, 441f and 441g, provisions of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), 2 U.S.C. 431 *et seq.* The revisions clarify the Commission's application of the affiliation rules and resolve several issues concerning transfers between committees authorized by the same candidate. The amended rules also update the reporting requirements for conduits of earmarked contributions and define the term "conduit." In addition, the Commission has made several corresponding amendments to 11 CFR 100.5(g), 102.2(b), 110.1(f), 110.8(d), 114.5(g), 114.8(g) and 9034.4(d) to bring those provisions into conformity with the amendments to 11 CFR 110.3 through 110.8. Further information on these revisions is provided in the supplementary information which follows.

DATES: Further action, including the announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d) and 26 U.S.C. 9039(c). A document announcing the effective date will be published in the Federal Register.

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SUPPLEMENTARY INFORMATION: The Commission is publishing today the final text of revisions to its regulations at 11 CFR 110.3, 110.4, 110.5 and 110.6, which concern affiliation of political committees, transfers between committees, certain prohibited contributions, annual contribution limits for individuals, and earmarked contributions directed through conduits or intermediaries. The Commission is also publishing conforming amendments to §§ 100.5, 102.2, 110.1, 110.8, 114.5, 114.8 and 9034.4 to reflect the changes made in §§ 110.3 through 110.6 of the regulations.

On July 30, 1986 the Commission issued a Notice of Proposed Rulemaking (NPRM) in which it sought comments on proposed revisions to these regulations. 51 FR 27183. Ten written comments were received in response to the Notice. A public hearing was held on September 17, 1986, at which three witnesses presented testimony on the issues raised in the rulemaking.

Section 438(d) of title 2, United States Code, and 26 U.S.C. 9039(c), require that any rules or regulations prescribed by the Commission to carry out the provisions of titles 2 and 26 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on August 14, 1989. Please note that the methods of calculating legislative days are different under these two provisions. Although most of the regulations contained in this document implement title 2 of the United States Code, the conforming amendment to 11 CFR 9034.4 implements title 26. Consequently, the legislative days for the revisions to 11 CFR parts 100, 102, 110 and 114 will be counted separately from the legislative days for the conforming amendment to 11 CFR 9034.4. Thus, the title 2 rules and the title 26 rules may be promulgated on different dates, since the expiration of the time periods may not coincide.

Explanation and Justification

In revising §§ 110.3 through 110.6 of the regulations, the Commission has addressed several significant issues. The principal areas in which the rules published today differ from the previous language of these sections are as follows:

(1) The factors used to evaluate whether committees are commonly established, financed, maintained or controlled and therefore affiliated (*see* § 110.3(a)(3));

(2) Transfers of funds between previous and current federal campaign committees of the same candidate (*see* §110.3(c)(4));

(3) Transfers of funds between principal campaign committees of a candidate who is concurrently seeking more than one office (*see* § 110.3(c)(5));

(4) New language on transfers of funds from a candidate's nonfederal campaign to that candidate's federal campaign committee (*see* § 110.3(c)(6));

(5) New language defining the term "conduit or intermediary" (*see* § 110.6(b)(2)); and

(6) Reporting of earmarked contributions by both the recipient candidate's committee and the conduit or intermediary (*see* § 110.6(c)).

After considering the public comments and testimony on the current presumption that state and local party committees are affiliated, and thus subject to common contribution limits, the Commission has decided to retain the current language.

The Notice of Proposed Rulemaking also raised questions concerning affiliation between a candidate's authorized committee and an unauthorized committee established, financed, maintained or controlled by the candidate or the candidate's campaign organization. Having evaluated the two public comments and testimony on this complex area, the Commission has decided to continue to apply the affiliation factors at 11 CFR 110.3(a)(3)(ii) in these instances.

Another significant issue in this rulemaking concerns the exercise of direction or control by a conduit over the choice of the recipient candidate for earmarked contributions. The Commission has decided to retain the wording of the current rules at § 110.6(d) and to continue to rely upon the standards it has delineated in previous decisions.

Finally, the Commission has included new subheadings in each paragraph of §§ 110.3, 110.4, 110.5, and 110.6 for the convenience of the reader.

Section 110.3 Contribution Limitations for Affiliated Committees and Political Party Committees; Transfers (2 U.S.C. 441a(a)(5), 441a(a)(4))

This section has been substantially revised to resolve a number of issues that have been raised during the administration and enforcement of this provision since it was promulgated in 1977. In addition, § 110.3 has been retitled "Contribution limitations for affiliated committees and political party committees; Transfers" to reflect that several provisions pertaining to political party committees are located in this section.

Section 110.3 has been reorganized to some extent. As in the current rules, paragraph (a) implements contribution limitations for affiliated committees and explains when committees are considered affiliated. Revised paragraph (b) explains how the affiliation rules affect the contribution limits for political

party committees. Revised paragraph (c) consolidates the rules located in current paragraphs (a)(2) and (c) concerning transfers between committees.

Section 110.3(a) Contribution Limitations for Affiliated Committees

Section 110.3(a), as revised, follows current § 110.3(a)(1) by applying the FECA's contribution limits to affiliated committees other than political party committees. This paragraph implements the "anti-proliferation" provisions of 2 U.S.C. 441a(a)(5).

Paragraph (a)(1) states that general rule the committees commonly established, financed, maintained or controlled are affiliated, and are therefore subject to common contribution limits. The new rules modify current paragraph (a)(1) in several respects. First, the revisions specify that the shared contribution limits for affiliated committees apply to both contributions made by those committees and to contributions they receive. Second, the revisions clarify that committees may be affiliated even if one of them is not a political committee as defined in 11 CFR 100.5. Several previous advisory opinions (AOs) have made this point. *e.g.* AOs 1987-12, 1985-2, 1984-46 and 1982-52. Next, revisions to paragraph (a)(1)(i) clarify that the common contribution limits apply to all the authorized committees of a candidate for the same election. Separate contribution limits would apply to a candidate's authorized committees for different elections. However, transfers between authorized committees will in some situations require that the contributions transferred be aggregated and subject to a single contribution limit. *See* 11 CFR 110.3(c). Finally, paragraph (a)(1)(ii) has been revised to state that in appropriate cases, the term "local unit" may include a franchisee, licensee, or state or regional association. *See* AOs 1983-46, 1979-38, 1978-61 and 1977-70.

A list of committees viewed as *per se* affiliated is set forth in paragraph (a)(2). This list is essentially the same as the one set forth in current paragraph (a)(1)(ii), which was taken from the House and Conference reports on the 1976 amendments to the FECA. H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 6 (1976); H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 58 (1976).

One commenter questioned whether the proposed revisions to § 110.3(a) were intended to change the Commission's view of Congressional intent to exclude the relationship between a labor federation, such as the AFL-CIO, and an international or national labor organization from the affiliation rules. The commenter pointed out that the legislative history of the 1976 FECA Amendments evidences a decision by Congress to continue the *status quo* by permitting separate contribution limits for the separate segregated fund of a labor federation structured along the lines of the AFL-CIO and the separate segregated fund of an international or national labor organization that is a member of the labor federation. The comment argues that this view is reflected in the set of five interrelated anti-proliferation rules first stated by Rep. Wayne Hays, Chairman of the House Administration Committee, during a markup session on the 1976 FECA Amendments and later restated in the House Committee and the Conference Committee reports on those amendments. H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 6 (1976); H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 58 (1976). The comment concludes from the legislative history that Congress was well aware of the existence of separate segregated funds established by such labor federations and viewed them as separate from political committees established by their constituent members, entitled to separate contribution limits. Consequently, the commenter assumed that the language proposed in the NPRM was based on an intention not to apply the affiliation factors in paragraph (a)(3)(ii) to labor federations. However, if that assumption was incorrect, the comment suggested several specific revisions to the affiliation factors, which are addressed below in the discussion of those paragraphs.

On several occasions, the Commission has determined that the AFL-CIO COPE-PCC and the separate segregated funds of the AFL-CIO's constituent member unions were not affiliated under the anti-proliferation rules established by 2 U.S.C. 441a(a)(5). *See* MURs 354, 783 and 1605. These conclusions were based upon the legislative history of section 441a(a)(5) cited by the commenter. Current §§ 100.5(g) and 110.3(a) incorporate the anti-proliferation rules stated by Rep. Hays and the congressional reports. These provisions are included in the new rules with minor clarifying revisions. Consequently, the revisions to §§ 110.3(a) and 100.5(g) do not alter the Commission's previous decisions in MURs 354, 783 and 1605. Under the revised rules, there are separate contribution limits for the separate segregated funds of labor federations and the separate segregated funds of their member national and international unions. However, this exception to the anti-proliferation rules only applies to labor federations whose relationships with their member unions are structured along the lines of the relationship that existed between the AFL-CIO and its member unions at the time the 1976 amendments to the FECA were enacted by Congress.

New paragraph (a)(3) makes several revisions to the "indicia of affiliation" currently found in § 110.3(a)(1)(iii). First, the terminology has been changed by substituting "circumstantial factors" for "indicia." Next, new paragraph (a)(3)(i) has been added to explain that in making affiliation determinations, the Commission may examine a variety of relationships, including the relationship between organizations sponsoring committees, between the committees themselves, or between one sponsoring organization and a committee established by another sponsoring organization. The NPRM suggested including language to clarify that the factors are used to determine whether committees are affiliated. The Commission has now decided to add additional language to provide a more complete explanation of the role of the affiliation factors set forth in paragraphs (a)(3)(ii) (A) through (J). The Commission will examine the factors in evaluating the overall relationship between committees or their sponsoring organizations to determine whether there is evidence that the committees are commonly established, financed, maintained or controlled, and therefore affiliated. The Commission notes that the factors set out in § 110.3(a)(3)(ii) could have been used to evaluate the relationships that result when an entity creates smaller organizational units, as well as the relationships that result when entities join together to create a larger organization.

The factors, themselves, have been revised to rework proposed language that could have been interpreted more broadly or narrowly than intended, and to explain more clearly the type of activity covered by each factor. Several of the revisions have been made in response to legitimate concerns raised by the two public comments that discussed the current indicia of affiliation.

The first factor in paragraph (a)(3)(ii)(A) concerns the ownership of a controlling interest in the voting stock or securities of an organization sponsoring another committee. This factor is based on current paragraph (a)(1)(iii)(A).

Paragraph (a)(3)(ii)(B) follows current paragraph (a)(1)(iii)(B) by addressing the authority or ability of one sponsoring organization or committee to direct or participate in the governance of another

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sponsoring organization or committee through its constitution, bylaws, contracts or other rules. One comment on the proposed rules suggested that this indicium also include the ability to influence the decisions of the officers or members of another entity. Another commenter urged the Commission to revise this factor to consider only significant authority to govern another sponsoring organization or committee. The Commission has decided, instead of including either of these suggestions, to include new language in revised paragraph (a)(3)(ii)(B) to explicitly recognize that formal or informal practices or procedures should be considered in examining the relationship between the organizations or committees.

Revised paragraph (a)(3)(ii)(C) concerns a committee's or sponsoring organization's authority or ability to hire, appoint, demote or otherwise control the officers or decision-making employees of another sponsoring organization or committee. This paragraph is based on current paragraph (a)(1)(iii)(C). One commenter recommended revising this factor to focus only on situations where the authority to hire, appoint or demote is "significant." Another comment recommended that the current language, which focuses on the ability to influence decision-making, be retained. The Commission has revised this factor by including the authority or ability to otherwise control the decisionmakers because "control" is a more specific term that more accurately describes the kind of involvement that could lead to affiliation.

Revised paragraph (a)(3)(ii) contains two new factors in paragraphs (D) and (E) which facilitate consideration of whether the sponsoring organizations or committees have common or overlapping members, officers or employees. One public comment observed that common or overlapping membership with another sponsoring organization or political committee should not be one of the criteria because it merely reflects similar goals for the two organizations or committees. For this reason, the Commission has refined the proposed rule to clarify that the presence of common or overlapping members, officers or employees is only significant when it indicates a formal or ongoing relationship between the committees or sponsoring organizations.

Another comment argued that the proposed rules did not clearly cover consecutive roles an individual may have in various organizations or committees. Therefore, the comment recommended that the Commission add new language to the regulations to permit consideration of whether a political committee or sponsoring organization has any members, officers or employees who were members, officers or employees of another sponsoring organization or committee. The Commission has now included new paragraph (a)(3)(ii)(F) to address this type of situation. New paragraph (F) explains that consecutive roles are a consideration only when they reveal a formal or ongoing relationship between sponsoring organizations or committees or when they indicate the creation of a successor entity.

New paragraph (a)(3)(ii)(G), which is based on current paragraph (a)(1)(iii)(E), focuses on the funding of one committee or sponsoring organization by another. This paragraph has been amended to reflect the fact that the provision of goods may be as significant as the provision of funding. Also, language has been added to clarify that occasional transfers resulting from joint fundraising activities under 11 CFR 102.17 are not considered in affiliation determinations. Under section 441a(a)(5)(A) of the FECA, the contribution limits for affiliated committees do not limit transfers between otherwise unaffiliated committees of funds raised in accordance with legitimate joint fundraising activities. The proposed rules had also included a reference to 11 CFR 1026(b)(1)(iv) regarding collecting agents for the separate segregated fund of a federation of labor organizations. This reference has been deleted from the final rules because it did not involve a joint fundraising situation.

The single comment on the current financing indicium of affiliation suggested including financing that does not involve the direct passing or payment of funds between two entities as an indicium of affiliation. The comment cited instances where the Commission has considered efforts by one organization or committee to arrange for contributions to be made to another organization or committee in determining whether they are affiliated. MURs 1687, 1704, and 1722. The comment recommended that the proposed regulation be redrafted to clarify that affiliation may result when a sponsoring organization or a committee provides for the indirect financing of another organization or committee. The Commission agrees that some forms of indirect financing should be treated as evidence of affiliation. Accordingly, new paragraph (a)(3)(ii)(H) has been added to the regulations to take into account indirect methods of financing, such as where one entity regularly arranges for a committee to receive contributions from third parties.

New paragraph (a)(3)(ii)(I) has been added to permit consideration of whether a sponsoring organization or committee has an active or significant role in forming another committee or sponsoring organization. One comment suggested that the rule should also focus on the role played by the personnel of an organization or committee in determining whether one entity has a significant role in the formation of another. The commenter expressed the concern that individuals may establish several committees or organizations as "spin-offs" and yet contend that they are not affiliated. The commenter recommended redrafting this language to consider whether the members, officers, employees or agents of an entity had an active or leadership role in the formation of another sponsoring organization or committee. Consequently, the Commission has modified the wording of this provision to permit consideration of whether an agent of the sponsoring organization or committee had this type of role.

The NPRM had proposed deleting current paragraph (a)(1)(iii)(D), which concerns similar patterns of contributions. One comment urged the Commission to reinstate this provision because the commenter believed that public records of contributions provide objective evidence of affiliating conduct. The Commission has previously considered whether committees received their contributions from the same source or made contributions to the same candidates as an indicium of affiliation in several compliance matters and advisory opinions. The Commission had decided to delete this criterion from the proposed rules because political committees with similar political viewpoints and objectives may tend to make contributions to the same candidates and receive contributions from the same donors even though the committees are completely independent. The Commission has now determined that these concerns can be alleviated by retaining this factor and adding language in new paragraph (a)(3)(ii)(J) explaining that similar patterns of contributions and contributors are evidence of affiliation only when they indicate a formal or ongoing relationship between the sponsoring organizations or committees.

The Commission has evaluated the previously proposed revisions to section 110.3(a) in light of the subsequent decision in *Federal Election Commission* v. *Sailors' Union of the*

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Pacific Political Fund, 828 F.2d 502 (9th Cir. 1987). The Commission has concluded that the unique circumstances present in that case do not necessitate any additional changes in the affiliation rules.

A question that has arisen in advisory opinions is whether affiliated committees, such as separate segregated funds of corporations, may disaffiliate at some point after their parent corporations have ceased to be commonly owned or controlled. *See* AOs 1987-21 and 1986-42. Although the entities involved in those advisory opinions had not reached the point of disaffiliation, the Commission recognizes that under the appropriate circumstances, disaffiliation might be possible. *See* AO 1983-28. The revised rules do not address this topic because the Commission has not had sufficient opportunities to examine particular situations in which corporations or other organizations seek to sever their connections with other corporate or noncorporate entities and to develop criteria for such determinations. However, nothing contained in the new affiliation regulations reverses or modifies the Commission's decisions on this subject.

There are several consequences resulting from a determination that committees are affiliated. First, affiliated committees share a common contribution limit with regard to all contributions they make or receive. If either of the affiliated committees is a multicandidate committee, the multicandidate committee's higher contribution limit applies to contributions made by either committee. Another consequence of affiliation is that there is no limit on the total amount of funds that may be transferred between the two committees under 11 CFR 102.6(a). However, transfers must be made only from funds which are permissible under the Act. Furthermore, new § 110.3(c)(5) and current § 110.6(d) contain certain restrictions on transfers between affiliated campaign committees of a dual candidate for federal offices or for federal and state offices. *See* discussion of new § 110.3(c)(5) below.

Under § 102.2, political committees are required to list on their Statements of Organization other political committees with which they are affiliated. Accordingly, § 102.2 has been amended to assist the reader in locating the affiliation provisions in the regulations. However, each affiliated committee that qualifies as a political committee under the FECA is responsible for satisfying its own recordkeeping and reporting obligations under 11 CFR parts 102 and 104. *See* AOs 1985-6, 1979-66 and 1979-56.

Finally, the Commission notes that determinations of affiliation will affect the ability of a corporation or federation of trade associations to solicit specific categories of individuals under 11 CFR 114.5(g) and 114.8(g). Specifically, the Commission has used the indicia of affiliation to decide whether particular entities, such as franchisees, licensees, wholesale distributors, partnerships and joint ventures are "affiliates" of corporations for solicitation purposes. *See* AOs 1988-6, 1988-46, 1987-34, 1985-31, 1985-7, 1984-36, 1983-48, 1983-46, 1979-38, 1978-61, 1978-39 and 1977-70. Accordingly, the Commission has included a cross-reference to the § 100.5(g) definition of "affiliated committee" in the portions of §§ 114.5 and 114.8 that refer to "affiliates." A similar reference has not been included, however in § 114.7, which addresses solicitations by membership organizations, cooperatives and corporations without capital stock, since the term "affiliate" is not used in § 114.7.

The NPRM observed that increasing numbers of candidates and prospective candidates are establishing political action committees (PACs) that make contributions to Federal, state and local candidates and conduct other political activities on instructions from or in conjunction with the founding candidates. Thus, the Commission sought comment on whether the indicia of affiliation in § 110.3(a) should continue to be applied to determine if such "candidate PACs" or "leadership committees" are affiliated with the candidates' authorized campaign committees. Questions were raised in AO 1978-12 concerning the status of a committee that expected to receive the assistance of a congressman in raising funds and making contribution decisions. The AO indicated that the committee was not considered an authorized committee if the congressman had not given it written authorization. On the basis of the facts presented, the Commission assumed the committee would not be affiliated with the congressman's principal campaign committee. The opinion did not, however, "give blanket approval for a general proposal" like the one described in the request. AO 1978-12. Thus, the Commission has acknowledged that under certain circumstances a candidate PAC or leadership committee may be considered affiliated with the candidate's campaign committee for the purposes of the contribution limitations. The Commission has relied upon the current indicia of affiliation in § 110.3 to determine whether particular authorized committees and candidate PACS were affiliated in MURs 2161, 1670, 1741, 950 and 459. Questions of this nature were also presented in AOs 1986-6 and 1985-40.

Two comments were received on this issue. One comment stated that a candidate PAC should be viewed as affiliated with the candidate's campaign committee and thus both committees should be subject to a single contribution limit. The other commenter submitted a draft provision that would implement a specific *per se* affiliation rule for a candidate's authorized committees or exploratory committees and any other committee established by the same candidate or significantly influenced by the candidate in its solicitation, contribution or expenditure activities.

Although the Commission considered including in the revised regulations language that would focus specifically on affiliation between authorized committees and candidate PACs or leadership committees, the Commission has decided instead to continue to rely on the factors set out at 11 CFR 110.3(a)(3)(ii). After evaluating the comments and testimony on this issue, as well as the situations presented in the previous advisory opinions and compliance matters, the Commission has concluded that this complex area is better addressed on a case-by-case basis. Thus, in an appropriate case, the Commission will examine the relationship between the authorized and unauthorized committees to determine whether they are commonly established, financed, maintained or controlled.

Section 110.3(b) Contribution Limitations for Political Party Committees.

Section 110.3(b) implements section 441a(a)(5)(B) of the Act by explaining how the FECA's antiproliferation provisions apply to different types of political party committees. Although § 110.3(b) has been reorganized, it does not change the current rules as to when separate contribution limits are available for particular types of party committees. New paragraph (b)(1) generally follows current paragraph (b)(1) by providing that the contribution limit that applies to the national committees of a political party is separate from the contribution limit for the state committees of the same political party. Please note that the separate contribution limits in new paragraph (b)(1) apply to contributions made or received by national and State party committees.

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The revised regulations delete current paragraph (b)(3), which sets out examples involving contributions by national party committees, House campaign committees, state party committees and subordinate committees of State parties. It did not seem appropriate to include those examples in the regulations since examples are generally included in the Explanation and Justification. Thus, these examples are discussed below, and their deletion from the text of the regulations does not mean they have been invalidated.

New paragraph (b)(2) has been reorganzied to consolidate the provisions in current paragraphs (b)(2)(i) and (b)(4) explaining the contribution limits that apply to certain types of national party committees. Under the revised rules, the House campaign committee and the national committee of the same political party have separate per election limits on contributions they give to any federal candidate, including a candidate for the House of Representatives, the Senate or a candidate seeking the party's nomination for President. Similarly, the Senate campaign committee and the national committee of the same political party have separate per election limits on contributions to House candidates and candidates for President. However, with regard to contributions to Senate candidates, the Senate campaign committee and the national committee of the same party share a single $17,500 limit on contributions made at any time in the six year Senate election cycle. *See* 11 CFR 110.2(e). Finally, the Senate and House campaign committees have contribution limits which are separate from each other.

New paragraph (b)(3) follows current paragraph (b)(2)(ii) by explaining that contributions made by a State party committee and by subordinate State party committees are presumed to be made by a single committee. However, this provision also grants these party committees an opportunity to demonstrate that they qualify for an exemption from the affiliation rules, provided they can show thay have not received funds from any other party committee and that they do not make contributions in cooperation, consultation or concert with, or at the request or suggestion of, any other party unit or party committee.

In applying these rules, the Commission has encountered several questions including who has the burden of rebutting the presumption and what aspects of the relationship between a state party committee and a subordinate state party committee should be looked at to determine whether these committees are affiliated. Accordingly, the Commission sought comments on proposed language to clarify the application of the presumption in the current rules and to permit consideration of a wider range of interactions between a state party committee and subordinate state committees in determining whether they are entitled to separate contribution limits. The criteria proposed were based upon factors considered by the Commission in AO 1978-9.

Five comments were received on the proposed revisions to the rules governing the contribution limitations for state party committees and subordinate state party committees. The commenters opposing the proposed regulation argued that county committees and other local party units are independent of state party committees and are, therefore, entitled to separate contribution limits. However, according to these comments, county party units partly finance state party committees in some states, while in other states the county parties are financially supported by the state political party. One state party indicated that it has an agreement to provide office space at no cost to one of the county party units, in addition to providing the county party with financial support in a fixed amount per month. The comments and testimony illustrated and emphasized the complexity and greatly varying nature of relationshps between state party committees, county party committees, and other local party units.

One comment expressed the concern that the proposed change in terminology from "any party unit" to "the state party" in the draft rules could permit a subordinate party committee that received financing from or acted in consultation with party units other than the state committee, such as a national party committee, to claim that it operated independently and was entitled to a separate contribution limitation. This comment supported the approach taken in the current rules, which examines the contacts between the subordinate committee and any other party unit.

In light of the questions raised regarding the current rule and the proposed amendments, the Commission has reviewed the pertinent legislative history on this matter, as well as the 1976 rulemaking proceeding which culminated in the promulgation of the current rule. *See* FEC Agenda Document #87-79, at pp. 11-16 (July 22, 1987) (considered on Aug. 6, 1987). Finally, the Commission has examined various state laws and the bylaws of several state party committees to ascertain the general structure of state party organizations and to determine how state and local party committees interact with each other.

The Commission has decided not to adopt the approach urged by the commenters who favor treating state and local party committees as independent or *per se* unaffiliated because this approach would be in conflict with some of the evidence presented in this rulemaking and with the legislative history of the anti-proliferation provision of the Act. At this time the Commission has determined to retain the current language. Accordingly, in lieu of the language proposed in the July 30, 1986 NPRM, new § 110.3(b)(3) follows the language of current § 110.3(b)(2)(ii) by presuming that state party committees and subordinate state party committees are affiliated and by granting these committees the opportunity to demonstrate otherwise.

Section 110.3(c) Transfers

The rules pertaining to transfers of funds between political committees, including campaign committees and party committees, are currently set forth in paragraphs (a)(2) and (c) of § 110.3. The revised rules consolidate these provisions into a single paragraph (c) and resolve several significant points that have been raised regarding transfers. For example, new paragraph (c) clarifies the method used to determine whether the funds transferred between candidate committees contain any impermissible contributions. The cash on hand of the transferor is considered to consist of the funds most recently received, and the transferor must be able to demonstrate that it has sufficient permissible funds on hand at the time of the transfer. With regard to transfers from a federal candidate's previous campaign committee to his or her current campaign committee, new paragraph (c) explains when the transfer affects the original contributors' per election contribution limitations. The new rules also provide additional guidance as to when candidates are considered to be actively seeking more than one Federal office for purposes of the transfer rules. Finally, new paragraph (c) addresses transfers from a candidate's nonfederal campaign to the same candidate's Federal campaign committee. The Commission received no public comments on the proposed revisions to the transfer rules or on any

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of the transfer issues raised in the NPRM.

The Commission has deleted from the revised transfer rules the current provision in § 110.3(a)(2)(ii) allowing transfers between a candidate's authorized committees in situations where the candidate has not received a waiver from reporting. This provision is not needed because candidates no longer have the option of reporting separately from their principal campaign committees. Moreover, transfers between authorized committees are covered by new paragraphs (c)(4) and (c)(5).

New paragraph (c)(1) follows current paragraph (c) by permitting unlimited transfers of funds between affiliated or unaffiliated party committees of the same political party. Language has also been added to paragraph (c)(1) to explicitly state that the contribution limitations of 11 CFR 110.1 and 110.2 do not restrict transfers between affiliated committees or by collecting agents to a separate segregated fund. This is consistent with 11 CFR 102.6(a)(1) regarding affiliated committees, and with 11 CFR 102.6(b) concerning collecting agents. Please note, however, that under 11 CFR 102.6(a)(1)(iv), only permissible funds may be transferred. Furthermore, such transfers can trigger the Act's registration and reporting requirements for previously unregistered entities. See 11 CFR 102.6(a)(2).

New paragraph (c)(2) generally follows current paragraph (a)(2)(i) regarding the transfer of joint fundraising proceeds. New language has been included to clarify that under the joint fundraising rules, a participating committee or organization may not receive more than its allocated share of the funds raised.

Paragraph (c)(3) generally follows current paragraph (a)(2)(iii) concerning transfers between a candidate's primary and general election campaigns.

New § 110.3(c)(4) continues the overall approach taken by current § 110.3(a)(2)(iv), which permits transfers in either direction between a current campaign committee and a previous campaign committee of the same candidate, so long as the funds do not contain contributions in violation of the Act. In addition, new language has been included to clarify that transfers of permissible funds between two previous campaign committees of the same candidate are also allowed under paragraph (c)(4). This provision has also been modified to clarify that it applies only to transfers between a candidate's Federal campaign committees. Transfers from a candidate's nonfederal campaign to the same candidate's Federal campaign committee are covered by new paragraph (c)(6), discussed below.

Definitions of "previous Federal campaign committee" and "current Federal campaign committee" have also been included in new paragraph (c)(4). These definitions are intended to distinguish transfers between previous and current campaign committees (which come within paragraph (c)(4)) from transfers between committees of dual Federal candidates (which are subject to somewhat different requirements, as set out in paragraph (c)(5)). The phrase "previous Federal campaign committee" refers to a campaign committee that supported a candidate in any federal election that has already been held. A "current Federal campaign committee" refers to the candidate's committee that is working for his or her nomination or election in an upcoming election.

The Commission has added new language to paragraph (c)(4) to assist committees in determining whether contributions to each committee from the same contributor must be aggregated upon transfer, and consequently whether the transfer would result in the making of excessive contributions. Under new paragraphs (c)(4) (iii) and (iv), aggregation of contributions is required if the transferred contributions were made after the previous election is over, or after the candidate withdrew from or became ineligible to participate in the previous election. However, post-election contributions need not be aggregated if they are properly designated for outstanding debts. Thus, the aggregation provisions effectuate the statutory scheme which establishes contribution limits on a per election basis. The new language is consistent with the approach taken in AOs 1987-4, 1986-12, 1980-30 and in revised 11 CFR 110.1(b) (1987).

Finally, the Commission notes that questions were raised in AO 1988-5 regarding transfers by a publicly funded Presidential campaign to a previously publicly funded campaign committee of the same candidate. The Commission held that this type of transfer from a publicly funded committee is not a qualified campaign expense under 11 CFR 9032.9(a). Therefore, the Commission concluded that such a transfer is not permissible until after the audit process is completed and any repayment obligations and any possible civil penalties are satisfied. The new regulations at 11 CFR 110.3(c)(4) do not directly address the issue of nonqualified campaign expenses presented in AO 1988-5. However, nothing contained in the new transfer provisions would reverse or modify the Commission's decision in that advisory opinion.

Paragraph (c)(5) of § 110.3 implements the statutory restrictions found in 2 U.S.C. 441a(a)(5) on transfers between principal campaign committees of a candidate who is seeking nomination or election to more than one Federal office. Although new paragraph (c)(5) generally follows current § 110.3(a)(2)(v), new language has been included to provide further guidance on certain points. First, the revised rules clarify when a candidate is deemed to be seeking more than one Federal office, and is thus subject to the "dual candidate" transfer rules of paragraph (c)(5). An individual is considered to be seeking more than one Federal office if the individual is concurrently a candidate for more than one Federal office during the same or overlapping election cycles.

New paragraph (c)(5)(i) follows the current regulations and 2 U.S.C. 441a(a)(5)(C) by prohibiting transfers until the candidate is no longer "actively seeking" more than one Federal office. The revised rules continue to list the situations where the candidate will no longer be considered to be actively seeking a particular office—when the principal campaign committee has filed a termination report or has notified the Commission that no further campaign activities will be conducted except for expenditures for debt retirement purposes. The NPRM suggested including other situations where candidates are prohibited from running for more than one office by operation of state law. Along these lines, the Commission has now added two new examples to paragraph (c)(5)(i): Where the candidate is ineligible for nomination or election to more than one office by operation of law, such as when the state filing deadline has passed, and where the individual publicly withdraws from the race and ceases to campaign. The first of these follows the Commission's decision in AO 1986-12.

New paragraph (c)(5)(ii) follows the current rules and section 441a(a)(5)(C) of the Act by requiring aggregation of a donor's contributions to each committee to the extent that such contributions are transferred between committees. Contributions must be excluded from the total amount transferred to the extent that they would exceed the donor's contribution limits with respect to the committee receiving the transferred funds.

Paragraph (c)(5)(iii) prohibits transfers where the dual federal candidate's committee "has elected to receive" public funding under title 26. This provision more closely conforms to the

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language in section 441a(a)(5)(C) of the Act than the wording of the current provision. The revision clarifies that the application of this provision does not depend upon the timing of the receipt of title 26 funding.

The Notice raised the question of what is meant by "more than one Federal office," noting the Commission's decisions in AOs 1982–22 and 1978–19. The Commission concluded in AO 1982–22 that a candidate is not running for two offices if the candidate switches Congressional districts in response to a court reapportionment plan. However, in AO 1978–19, the Commission decided that a candidate is running for two Federal offices if he or she enters races for two different Senate seats which span different terms. Specific language addressing these situations has not been included in the amended rules because they do not occur with sufficient frequency to warrant mention; however, these opinions still serve as precedent.

Another issue addressed in the NPRM concerned transfers between the campaign committees of a candidate who abandons his or her campaign for a second Federal office and reactivates the previous campaign for the first office, where both general elections are to be held on the same day. *See* AO 1984–38. In such a situation the Commission determined that if a contribution to the first campaign committee is transferred to the second campaign committee, it must be counted against the contribution limits for the second office. However, the contribution is still attributed to the contribution limits for the first office as well, unless the donor provides a written redesignation. The Commission has decided that this is another area in which specific regulatory language is not needed because this type of situation occurs infrequently.

The Commission has considered whether the restrictions on transfers between committees of dual candidates should also apply to situations where an individual is concurrently a candidate for one office and testing the waters for another office. Although the Commission is unable at this time to reach a conclusion on this issue, the Commission has determined that even if such transfers were permissible, contributions received by the campaign committee and contributions received by the exploratory committee from the same contributor would have to be aggregated for purposes of the contribution limitations of the FECA whenever such contributions are transferred.

Finally, the Commission notes that additional guidance concerning the operation of dual Federal campaign committees may be found at 11 CFR 110.8(d).

Paragraph (c)(6) sets forth new regulatory language concerning transfers of funds from a candidate's nonfederal campaign organization to his or her federal campaign committee. This paragraph generally follows the regulations concerning transfers between previous and current federal committees in § 110.3(c)(4) as well as the previous advisory opinions in this area. *See* AOs 1987–12, 1985–2, 1984–46, 1983–34 and 1982–52. Please note that if the candidate is conducting dual campaigns for state and Federal offices, the provisions of § 110.8(d) would be applicable instead of new § 110.3(c)(6).

Under new paragraph (c)(6), previous nonfederal committees may transfer funds to current federal committees, and current nonfederal committees may make transfers to previous federal committees. Although the total amount that may be transferred between the two affiliated committees is unlimited, the funds actually transferred must not include any contributions from prohibited sources or any contributions in excess of the contribution limits. To assure this, paragraph (c)(6)(i) states that the committee transferring the funds must be able to demonstrate that it has sufficient funds on hand at the time of the transfer that comply with the FECA's contribution limitations and prohibitions. This is consistent with the Commission's current approach in compliance matters. New paragraph (c)(6)(i) also requires the transferor committee to keep records of the sources of funds and to make these records available to the Commission upon request. This is consistent with the recordkeeping requirements for reporting committees.

Paragraph (c)(6)(ii) addresses the question of when contributions to the nonfederal and federal committees must be aggregated for purposes of the contribution limits of the Act. In determining whether contributions are excessive, the amount contributed by a particular person to the nonfederal committee must be aggregated with any contributions made by that person to the federal committee if the contributions were made after the state or local election was held, or after the candidate withdrew from the state or local election, or after the candidate publicly announces his or her candidacy for the Federal office. However, contributions included in the transferred amount that were made prior to the state or local election and while the candidate was still in the nonfederal race do not have to be aggregated with subsequent contributions to the federal campaign committee. AO 1987–12. These requirements effectuate the per election contribution limits of the FECA.

Consistent with previous Commission determinations, the new rules require nonfederal to federal transfers to count toward the threshold for political committee status under the Act. *See e.g.* AOs 1987–12, 1985–2 and 1984–46. Thus, under paragraph (c)(6)(iii), the nonfederal campaign committee must register and report if the amount transferred exceeds $1000. A statement of organization must be filed no later than ten days after the transfer occurs. The nonfederal committee's first report must disclose cash on hand, the source(s) of such funds, and the amount transferred to the federal committee. This information is required under current 11 CFR 104.12. As noted above, the amount transferred is composed of the funds most recently received, excluding any amounts that are not permissible under the FECA. The committee must itemize the sources of the funds transferred in a memo Schedule A in accordance with current 11 CFR 104.3(a)(4). Finally, the new rules allow the nonfederal committee's first report to serve as its termination report, if appropriate. During this rulemaking, the Commission explored alternatives that would have excluded nonfederal committees transferring over $1000 from the FECA's registration and reporting obligations. However, the Commission was not able to find an alternative given that the Commission no longer has the authority to grant waivers from the reporting requirements of the Act.

New paragraph (c)(7) has been added to the regulations to alert the reader that current § 110.8(d) contains additional provisions concerning concurrent campaigns for Fedeal office or for Federal and nonfederal office, including the requirement to maintain completely separate campaign organizations. The Commission may decide at a later time to initiate a rulemaking to move paragraph (d) of § 110.8 to a more appropriate place in the regulations.

Section 110.4 Prohibited Contributions (2 U.S.C. 441e, 441f, 441g, 432(c)(2))

This section implements sections 441e and 441f of the FECA by prohibiting contributions from foreign nationals in connection with any election for local, State or Federal public office, and by prohibiting contributions in the name of another. Section 110.4 also sets out restrictions on contributions of currency, in accordance with sections 441g and 432(c)(2) of the Act. The Commission

received no public comments on this section.

Paragraph (a) of § 110.4 contains no substantive changes regarding foreign nationals.

The rules pertaining to contributions in the name of another follow the current provisions, except that new paragraph (b)(1)(iii) has been added to specifically prohibit any person from knowingly helping or assisting any other person in making a contribution in the name of another. Former paragraph (b)(1)(iii) has been renumbered as paragraph (b)(1)(iv). The new language is consistent with a recent judicial interpretation of 2 U.S.C. 441f in *FEC* v. *Rodriguez*, No. 86-687 Civ-T-10(B) (M.D. Fla. May 5, 1987) (unpublished order denying motion for summary judgment). New paragraph (b)(1)(iii) applies to those who initiate or instigate or have some significant participation in a plan or scheme to make a contribution in the name of another, including those who solicit or act as go-betweens to third parties whose donations are reimbursed by the individual who performs a purely ministerial act without any knowledge of the scheme, such as someone who routinely reviews or approves all checks drawn on a specific account.

New paragraph (c) follows the language of current paragraph (c) regarding the making and receipt of cash contributions.

Section 110.5 Annual Contribution Limitation for Individuals (2 U.S.C. 441a(a)(3))

New section 110.5 generally follows current § 110.5 by implementing the $25,000 limitation on contributions made by individuals in a calendar year. The new provision contains several minor clarifying revisions to the current rules. First, the title of this section has been amended to emphasize that the $25,000 annual limitation applies only to contributions made by individuals. Next, new paragraph (a), designated "Scope," has been added to clarify that this section only applies to individuals permitted to make contributions under the Act and does not apply, for example, to foreign nationals or federal contractors. Accordingly, previous paragraphs (a) through (d) have been renumbered (b) through (e).

The wording of new § 110.5(b) has been slightly changed from current § 110.5(a) to clarify that the $25,000 contribution limit applies to all contributions made in the same calendar year. This provision has also been modified somewhat from the proposed rules because the language of the proposed rules could have been misinterpreted to mean that the annual limit does not apply to contributions to delegates or contributions to persons making independent expenditures. The revised language clarifies that these types of contributions are subject to the $25,000 annual limit. The Commission also notes that contributions to a "testing the waters" account under § 101.3 are subject to the annual contribution limit in the event that the individual receiving the contributions subsequently becomes a candidate. The $25,000 annual limit also applies to contributions to an account set up under 11 CFR 9003.3, including a legal and accounting compliance fund.

Paragraph 110.5(c), which is based upon current paragraph 110.5(b), explains when contributions made in a nonelection year are treated as made in an election year for purposes of the annual contribution limit. A definition of the term "nonelection year" has been included to avoid repetition of the phrase "in a year other than the calendar year in which an election is held."

Paragraphs (d) and (e) generally follow current paragraphs (c) and (d), respectively, by providing that the $25,000 limit applies to contributions to persons (including political committees) making independent expenditures and to contributions to delegates and delegate committees. None of the public comments addressed the possible changes to § 110.5 put forth by the Commission.

Section 110.6 Earmarked Contributions (2 U.S.C. 441a(a)(8))

Section 110.6 of the regulations implements 2 U.S.C. 441a(a)(8), which requires that all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, must be treated as contributions from that person to the candidate. Under section 441a(a)(8) of the FECA and § 110.6 of the Commission's regulations, conduits and intermediaries must report the original source of the earmarked contribution, as well as the intended recipient, to the Commission and to the intended recipient. Section 110.6 also provides that contributions over which the conduit exercises direction or control are treated as contributions from both the original contributor and the conduit, and are reportable as such. This provision is based on the legislative history of the 1974 amendments to the FECA.

The title of § 110.6 has been amended to include a reference to section 441a(a)(8) of the FECA. The current title incorrectly refers to section 441a(a)(7)(A) of the Act.

The Commission received three comments, and heard testimony from one of those commenters, regarding proposed revisions to the earmarking regulations. Two of these comments addressed questions concerning the permissibility of separate segregated funds acting as conduits, while the comments and testimony of the third commenter concerned the direction or control provisions.

Section 110.6(a) General

New § 110.6(a) follows current § 110.6(a) by treating contributions transmitted through a conduit to a candidate as subject to the original contributors' limits on contributions to that candidate.

The Notice of Proposed Rulemaking raised the question of whether the requirements set out in § 110.6 should apply to contributions earmarked to a political committee that is not an authorized committee of any candidate, such as a political action committee. The Commission noted that the statutory provision on which § 110.6 is based only refers to contributions earmarked or otherwise directed to a particular candidate. None of the public comments addressed this question.

The Commission has decided that § 110.6 should continue to be limited to contributions earmarked to candidates and their authorized committees, and thus should not be extended to include contributions earmarked to other types of political committees. However, as indicated in AOs 1983-16 and 1981-57, conduits would not be barred from forwarding earmarked contributions to unauthorized committees so long as they comply with the time limits for forwarding the contributions, as prescribed by 11 CFR 102.8. In such situations, unauthorized committees are required to report the amount received as a contribution from the original contributor pursuant to 11 CFR 104.3(a)(4).

Section 110.6(b) Definitions

The definition of "earmarked" in § 110.6(b)(1) follows the definition set forth in current § 110.6(b).

New paragraph (b)(2) has been added to provide a definition of the phrase "conduit or intermediary." The Commission has decided that providing a definition would be more useful than the previously proposed approach of simply setting forth factors or criteria for deciding who is a conduit. Additional guidance is needed because the question

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of whether a particular individual is acting as a conduit has been raised in several contexts, including compliance matters such as MUR 1690. Neither the provisions of the FECA, nor its legislative history, indicates what was intended by the term "conduit or intermediary."

The new definition of "conduit or intermediary" in paragraph (b)(2) encompasses all those who receive and forward contributions earmarked to a candidate or authorized committee, with certain exceptions discussed below. Please note that this definition does not distinguish between the term "conduit" and the term "intermediary." The Commission considers these terms to be synonymous.

The new rules recognize that certain persons are not properly considered conduits and are consequently not subject to the requirements of § 110.6. First, individuals who are employees or full-time volunteers for a campaign, or who are expressly authorized to engage in fundraising on behalf of the campaign and occupy significant positions in the campaign organization, would be viewed as agents of the campaign rather than conduits so long as they do not act on behalf of an entity prohibited from making contributions, such as a corporation. The Commission notes that in determining whether an individual is acting as an agent of the candidate's campaign or as an agent of another entity, one consideration would be whether the individual incurred any solicitation expenses, and if so, whether reimbursement was provided by the campaign committee or by any other entity.

Other exceptions from the definition of conduit include affiliated committees, fundraising representatives conducting joint fundraising with the candidate's campaign committee, and commercial fundraising firms retained by the campaign. Fundraising representatives have been excluded because their activities are already covered by the joint fundraising regulations at 11 CFR 102.17 and 9034.8. In addition, the activities of affiliated committees receiving earmarked contributions are governed by the affiliation rules in 11 CFR 110.3. Commercial fundraising firms hired by the candidate's authorized committee are considered agents of the committee rather than conduits.

The new definition of conduit also explicitly provides that persons who are prohibited from making contributions or expenditures in connection with Federal elections are also prohibited from serving as conduits for contributions earmarked to candidates or their campaign committees. Thus, corporations, labor organizations, government contractors and foreign nationals are not permitted to be conduits. This is consistent with AO 1988-4. However, this provision does not limit the ability of an organization or a committee, other than a foreign national, to function as a collecting agent for a related separate segregated fund under 11 CFR 102.6.

The Notice of Proposed Rulemaking also sought comments on whether to continue to permit separate segregated funds (SSFs) to serve as conduits for earmarked contributions. In three previous advisory opinions the Commission has permitted such activity. AOs 1988-4; 1981-21; and re: AOR 1976-92. However, the House Report accompanying the 1974 amendments to the Act states that the earmarking provisions "are not intended to apply to contributions from separate segregated funds maintained by corporations or labor organizations because donors to such funds must relinquish control of their donation to the corporation or labor organization and such donors may not earmark or direct such donations to any specific candidate or political committee." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 15 (1974). This statement is repeated in the Conference Report. H.R. Conf. Rep. No. 93-1438, 93d Cong., 2d Sess. 51 (1974). Hence, the NPRM proposed three alternative approaches: (1) Explicitly prohibit earmarking through SSFs; (2) Permit SSFs to receive and forward earmarked contributions but clarify that the contributions must not exceed the amount that the original contributor may donate directly to the candidate; (3) Permit SSFs to receive and forward earmarked contributions but specifically prohibit the corporation or labor organization from exercising direction or control over the choice of the recipient candidate.

Two comments from SSFs addressed these concerns. One favored alternative 2, allowing earmarked contributions through SSFs if they are limited to what the individual could lawfully contribute directly to the candidate. The other comment supported the current approach of permitting earmarking through SSFs and stated that nothing would be added by the adoption of either alternative 2 or 3 because those restrictions are already located in other portions of the regulations. This commenter felt that the present system promotes support for a wider range of candidates and political views.

Under new paragraph (b)(2), SSFs may continue to act as conduits or intermediaries for earmarked contributions. However, these earmarked contributions must not exceed the contribution limits that apply to the original contributor's donations to the candidate under section 441a of the Act. This practice is also consistent with § 114.3(c)(2), which allows candidates and party representatives to address an organization's restricted class and to ask that contributions to the organization's SSF be designated for the candidate's campaign or party. SSFs acting as conduits will continue to be required to report their conduit activities pursuant to section 110.65 (c) or (d). *See* AO 1981-21 and re: AOR 1976-92. Furthermore, if a SSF incurs expenses in soliciting contributions on behalf of particular candidates, those solicitation expenses should be reported as in-kind contributions or as independent expenditures by the SSF to the candidate, depending on the circumstances. Finally, the Commission had decided that where the circumstances demonstrate that the SSF exercises direction or control over earmarked contributions, the SSF must treat those contributions as contributions from both the original contributor and the SSF. This is consistent with the Commission's decisions in AO 1988-4 and re: AOR 1976-92.

As discussed above, under the new definition of "conduit or intermediary" a corporation or labor organization may not itself act as a conduit. This represents a continuation of the Commission's previous approach regarding the permissible scope of activities undertaken by a corporation of labor organization not acting through a SSF. Within the confines of 11 CFR 114.3, the corporation or labor organization may encourage those in its solicitable class to contribute to particular candidates or political committees. *See* Explanation and Justification for § 114.3, H.R. Doc. No. 95-44, 95th Cong., 1st Sess. 104 (1977). However, in AOs 1987-29, 1988-4 and 1982-2 the Commission has stated that corporations are not permitted to act as conduits or intermediaries or facilitate the making of contributions. If a corporation establishes an employee participation plan pursuant to 11 CFR 114.11, only the custodian of the accounts, and not the corporation, may forward employee contributions that have accumulated in the accounts. The Explanation and Justification for section 114.11 explains that corporations and labor organizations are also forbidden to exercise any direction or control over employee contributions to such plans because this would result in illegal corporate expenditures. H.R. Doc. No.

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95-44, 95th Cong., 1st Sess. 116, 117 (1977).

The new definition of "conduit or intermediary" also recognizes that those who serve as conduits or intermediaries are required to forward earmarked contributions to the intended recipient candidate committees within the time periods prescribed by 11 CFR 102.8. However, anyone who is prohibited from being a conduit, but nevertheless receives earmarked contributions, must return them to the contributor rather than forwarding them.

Section 110.6(c) Reporting of Earmarked Contributions

The Commission notes that sometimes contributions must be reported by several entities under different provisions of the Act. The principal reporting provision is 2 U.S.C. 434, which requires political committees, including committees authorized by candidates, to report their receipts and disbursements to the Commission. Section 441a(a)(8) of the Act requires conduits and intermediaries to report the source and intended recipient of earmarked contributions to the Commission and to the intended recipient. Section 432(b) of the FECA is also, in some respects, a reporting provision as it requires persons receiving contributions for authorized and unauthorized political committees to forward certain information together with the contribution to the committee's treasurer, but not to the Commission. Through its regulations at part 104, § 102.8 and § 110.6, the Commission has set forth a reporting and recordkeeping system which takes into account the overlapping requirements of these statutory provisions.

The Commission has revised and reorganized the provisions of § 110.6(c) regarding the reporting of earmarked contributions. Paragraph 110.6(c)(1) consolidates the conduit reporting provisions in current paragraphs (c)(1), (c)(2), (c)(4), and (c)(5). Paragraph 110.6(c)(2) sets forth reporting requirements for recipient candidates and their authorized committees based on present paragraph (c)(3).

Paragraph (c)(1) generally follows the provisions of current paragraph (c)(1). However, the new rules specify that information on earmarked contributions should be included in the conduit's report for the reporting period in which such contributions were received, rather than simply stating that the information should be included in the conduit's "next due" report.

Section 110.6(c)(1) continues the current requirement that conduits not otherwise subject to the reporting requirements of 11 CFR part 104 must still report earmarked contributions to the Commission by letter. However, this paragraph has been amended to state that the letter is due thirty days after forwarding the earmarked contribution. The current rules do not specify a due date for the letter. Two alternatives were discussed in the NPRM—either requiring the letter to be filed within 30 days after receiving the earmarked contribution or within the time frames set out in § 104.5(c) for filing reports. The Commission concluded that it would be simplest to require reporting within thirty days after forwarding the earmarked contribution.

Revised paragraph (c)(1) also requires conduits to use memo entries to report contributions passed on by means of the contributor's check. The current regulations do not specify that memo entries be used.

New paragraph (c)(1) also incorporates paragraph (c)(2) of the current regulations by providing that the information pertaining to earmarked contributions shall be supplied to the candidate at the same time that the contribution itself is passed on to the intended recipient. For clarity, this paragraph contains a cross-reference to the ten-day forwarding requirement of 11 CFR 102.8(a).

In addition, revised paragraph (c)(1) follows present paragraph (c)(4) regarding the information that the conduit must report. Accordingly, the conduit must report the name and address of the contributor, the amount of the contribution, the date the conduit received it, the intended recipient's name, the date the contribution was forwarded and whether it was forwarded in cash, by the contributor's check or by the conduit's check. For contributions exceeding $200, the report must also include the contributor's occupation and the name of his or her employer.

Finally, the new conduit reporting rules delete the previous exception to the reporting requirements found in current paragraph (c)(5) for "occasional, isolated, or incidental physical transfers of checks or other written instruments payable to a candidate or his or her authorized committee" aggregating $1,000 or less per candidate per year. That exception was created when the Commission had authority to grant waivers to the Act's reporting obligations. As the Commission no longer has waiver authority, it is necessary to delete the exception.

New § 110.6(c)(2) requires candidates and their authorized committees to report the receipt of earmarked contributions. In contrast, the present rules state that all intended recipients must report earmarked contributions. The Commission has decided to restrict the reporting obligation to intended recipients that are candidates or authorized committees because 2 U.S.C. 441a(a)(8) refers to contributions earmarked to a particular candidate, but does not mention contributions earmarked to other recipients, such as political action committees.

Revised paragraph (c)(2) amends the reporting requirements for candidates and authorized committees in several other respects. The revisions clarify the reporting obligations that apply if the candidate or committee receives one or more earmarked contributions from a conduit which in the aggregate exceed $200 in a calendar year. The recipient candidate or committee is required to itemize the identification of the conduit, the total amount received from the conduit and the date of receipt. If contributions from a contributor aggregate over $200 in any calendar year, the candidate or committee is also required to itemize the identification of the contributor, the amount, and the date of receipt. For earmarked contributions aggregating $200 or less, the reporting requirements in 11 CFR part 104 continue to apply.

No public comments were received regarding the amendments to the reporting provisions in 11 CFR 110.6(c)(1) and (2).

Section 110.6(d) Direction or Control

The new regulations do not change the longstanding requirement that for purposes of a conduit's contribution limits, a contribution is treated as made by the conduit if the conduit exercises any direction or control over the choice of the recipient candidate. This rule is based on the House Report accompanying the 1974 amendments to the Act. It states that "if a person exercises any direct or indirect control over the making of a contribution, then such contribution shall count toward the limitation imposed with respect to such person under [current 2 U.S.C. 441a], but it will not count toward such a person's contribution limitation when it is demonstrated that such person exercised no direct or indirect control over the making of the contribution involved." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 16 (1974). The Conference Report repeats this language and states that the Conference substitute is the same as the House amendment with certain exceptions not relevant here. H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 51, 52 (1974).

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In the course of this rulemaking the Commission considered changing the terminology in § 110.6(d) to refer to "direct or indirect control over the making of an earmarked contribution" to more closely conform to the language set out in the Congressional reports discussed above. However, the Commission has now decided to retain the phrase "direction or control" used in the current regulation because this wording has become a commonly recognized term. The Commission also notes that a change in the wording could create the mistaken assumption that the Commission has changed the standard used to determine when the contribution counts against the conduit's contribution limits in addition to counting against the original contributor's limits. The Commission intends to maintain the current approach regarding the circumstances under which the direction or control rule applies.

The Commission also considered whether it would be advisable to provide criteria or examples or a definition of direction or control. The legislative history provides no guidance as to when this rule should apply. In the past, the Commission has considered such factors as whether the conduit controlled the amount and timing of the contribution, and whether the conduit selected the intended recipient. *See* MUR 1028, AO 1986-4 and re: AOR 1976-92. The Commission has also distinguished a "suggestion" to make a contribution from actual direction or control over the contribution. AO 1980-46.

In response to the questions raised in the NPRM, one organization submitted a written comment and testimony urging the Commission to revise this provision to prevent certain situations from occurring. The commenter pointed out that in recent years several political committees have collected sizeable numbers of checks made out to particular candidates, "bundled" them together and turned them over to the candidates. The commenter argued that bundling substantially undermines one purpose of the Act, which is to limit the actuality or appearance of corruption resulting from large individual financial contributions. *See Buckley* v. *Valeo*, 424 U.S. 1, 26-27 (1976). For this reason, the commenter urged the Commission to revise § 110.6(d) to provide that the conduit exercises direction or control if the conduit actively solicits others to contribute and then turns the funds over to the candidate in such a way that the candidate is aware of the conduit's role.

The Commission has carefully considered this comment, as well as several different versions of possible regulatory language. In light of the wide variety of earmarking situations which have arisen in the past, the Commission is not able at this time to formulate regulatory language that clearly delineates situations where direction or control exists from those in which the conduit does not exercise direction or control. Accordingly, the Commission will continue to evaluate these situations on a case-by-case basis. However, further guidance on this can be found in AOs 1987-29, 1986-4, 1980-46 and re: AOR 1976-92 as well as MURs 1028 and 2282.

Finally, the Commission has made several revisions to § 110.6(d)(2) to clarify the reporting of contributions when the conduit exercises direction or control. The conduit's reports to the Commission and to the recipient should indicate that the contribution is made by both the orginal contributor and the conduit, and that the entire amount is attributed to each of them. The recipient candidate or authorized committee should also report the dual attribution of the contribution.

Conforming Amendments

In addition to the foregoing revisions to 11 CFR 110.3, 110.4, 110.5, and 110.6, several amendments have been made to other sections of the Commission's regulations for clarification and to make those sections consistent with the revised language in 11 CFR 110.3 through 110.6. The conforming amendments are located in 11 CFR 100.5(g), 102.2(b), 110.1(f), 110.6(d), 114.5(g), 114.6(g), and 9034.4(d). The Commission received no public comments on these changes.

Section 100.5 Political Committee (2 U.S.C. 431 (4), (5), (6))

The definition of "affiliated committee" in § 100.5(g) has been revised to follow the language of new § 100.3(a).

Section 102.2 Statement of Organization: Forms and Committee Identification Number (2 U.S.C. 433 (b), (c))

The Commission has made two conforming amendments to the rules concerning Statements of Organization filed by political committees. First, Cross-references to § 110.3(a), 110.3(b), 110.14(j), and 110.14(k) have been added to assist political committees filing Statements of Organization in locating the applicable provisions concerning affiliation with other political committees, including political party committees and delegate committees. Secondly, the revisions clarify that Statement of Organization must disclose situations where an unauthorized committee and a principal campaign committee are affiliated.

Section 100.1 Contributions by Persons Other Than Multicandidate Political Committees (2 U.S.C. 441a(a)(1))

There are no substantive changes in this section. However, in paragraph (f)(3), the cross-reference to current § 110.3(a)(2)(iv) has been revised to refer to new § 110.3(c)(4).

Section 110.8 Presidential Candidate Expenditure Limitations

There are not substantive changes in this section. However, in paragraph (d)(2), regarding transfers between committees of dual candidates, the cross-reference to current § 110.3(a)(2)(iv) has been revised and corrected to refer to new § 110.3(c)(5). The cross-reference had incorrectly referred to the provision on transfers between previous and current campaign committees rather than the provision concerning transfers between committees of candidates concurrently running for more than one office.

Section 114.5 Separate Segregated Funds

A new sentence has been added to paragraph (g)(1) of § 114.5 to clarify that for solicitation purposes, the affiliation factors found in § 100.5(g)(4) shall be used to determine whether an organization is an affiliate of a corporation. The new sentence is consistent with AOs 1985-31 and 1983-48, and thus does not represent a substantive change.

Section 114.8 Trade Associations

A new sentence has been added to paragraph (g)(1) of § 114.8 to clarify that for solicitation purposes, the affiliation factors found in § 100.5(g)(4) shall be used to determine whether an entity is an affiliate of a federation of trade associations. This new sentence follows the new language added to § 114.5(g) and does not represent a substantive change.

Section 9034.4 Use of Contributions and Matching Payments

Section 9034.4(d), which governs transfers of funds by candidates receiving federal matching funds, has been amended in three respects. First, new language has been added to paragraph (d) to clarify the relationship between this provision and the transfer rules at new 11 CFR 110.3(c)(5) applicable to dual Federal candidates. Next, the cross-reference to current § 110.3(a)(2)(v) has been changed to

revised § 110.8(c)(5), and a new cross-reference to § 110.8(d) has been added to assist the reader in locating additional provisions pertaining to transfers. Finally, § 9034.4(d) has been reworded to clarify that the statutory requirements set forth in this paragraph apply to all candidates who have elected to receive matching funds, and are not limited to those who have already received matching funds.